In The

Supreme Court of the United States

October Term, 1977

No. 77-862

SOUTHERN IDAHO PIPE & STEEL CO.,

Plaintiff-Respondent,

vs.

CAL-CUT PIPE & SUPPLY, INC., d/b/a Western Pipe & Tube Co.,

Defendant-Appellant.

MOTION TO DISMISS

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STATEMENT OF CASE

I. Background

The appellant's Statement of the Case generally sets out the facts as they occurred in this case. However, it does gloss over points which the respondent feels are very important. These points are as follows:

1. The undisputed evidence shows that the defendant had been doing business with the plaintiff by sending flyers directly to the plaintiff for some ten years past. In fact, the flyer which led to the transaction in question was addressed personally to the attention of the plaintiff's manager.

2. The Idaho Supreme Court, based upon the record, in this case, *Southern Idaho Pipe & Steel v. Cal-Cut Pipe,* 98 Idaho 495, 567 P. 2d 1246 (1977), made the following observation at page 1248: "Cal-Cut compensates for its lack of sales personnel in Idaho by sending advertising circulars directly to potential buyers, notifying them of the availability of steel pipe and announcing the terms of the sale." The plaintiff submits that this statement by the Idaho Supreme Court is correct and that it is a logical deduction to be arrived at from the facts of the case.

3. The contract was finally entered into when the plaintiff mailed to the defendant from Idaho, a $20,000 check as down payment upon the order of pipe. This check was on an Idaho bank and was accepted by the defendant.

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REASON FOR DENYING APPEAL

I.

Jurisdiction

Defendant claims that the jurisdiction of the Supreme Court to review the decision of the Idaho Supreme Court by direct appeal is conferred by Title 28, United

States Code, § 1257 (2). The constitutional validity of statutes commonly called Long-Arm Statutes, such as Idaho Code 5-514 (a) which is set forth in Appendix "B" of the Appellant's brief, has been upheld numerous times. This case does not lend itself to being a Federal question of substance not heretofore determined by this Court and under Rule 19 (a) of this Court, the appeal should not be heard.

The question submitted is not substantial. The question of whether or not a state court should have jurisdiction under its so called Long-Arm Statute has already been developed from the cases cited in the Appellant's brief. See *International Shoe Company v. State of Washington, etc.,* 326 U. S. 310, 66 S. Ct. 154 (1945); *Magee v. International Life Insurance Company,* 355 U. S. 220, 78 S. Ct. 199 (1957); *Hanson v. Denckla,* 357 U. S. 235, 78 S. Ct. 1228 (1958). Nothing new or novel is presented in this case.

II.

Due Process and Fair Play

In *International Shoe Company,* supra, the question of jurisdiction was equated to the flexible concept of due process as related to the question of whether or not a foreign defendant should be required to respond to the jurisdiction of the Courts of a foreign state. As stated in the Appellant's brief, the Court found that the concepts of due process when applied to the question of jurisdiction required only that the defendant sought to be brought in before the Courts of the forum:

> ". . . have certain minimum contacts with it (the forum) such that the maintenance of the suit does not

offend 'traditional notions of fair play and substantial justice.'"

In *International Shoe Company,* supra, at page 319 (U. S.), 160 (S. Ct.):

> "Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to ensure."

It is this writer's opinion that in determining whether or not the Idaho Courts have jurisdiction over a foreign corporation which has actively solicited business within the State of Idaho, that the psychology of salesmanship, an item which Cal-Cut would have the Court forget, must be reviewed. The normal steps in making a sale are as follows:

The seller desiring to make a sale, canvasses prospective purchasers. By this process he contacts a number of people in order to find out who is interested in his product. Canvassing can be effectively done by: (a) salesmen who make direct and personal calls within the state; (b) by letter or flyers sent directly to addresses of selected persons or boxholders, setting forth a telephone number or mailing address to be replied to if interested; (c) direct telephone calls to prospective purchasers, this latter method is becoming more and more prevalent with large companies using WATTS lines, in fact, the telephone companies are pushing this type of a business solicitation, pointing out the present energy crises and the increasing costs of transportation for salesmen to make personal calls; (d) newspaper and magazine ads which give a toll free number to call in response to the

advertisement. Cal-Cut is presently pursuing Idaho business in general with this latter approach. See Appendix "A" which is an ad that appeared in the Twin Falls Times News, Twin Falls, Idaho, on March 4, 1977.

Southern Idaho maintains that any one of these activities used to canvass prospective customers qualifies as "transaction of business" under Idaho Code 5-514 (a) which reads:

> "Any person, firm, company, association or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, firm, company, association or corporation, and if an individual, his personal representative, to the jurisdiction of the courts of the state as to any cause of action arising from the doing of any of said acts:
>
> (a) *The transaction of any business within this state* which *is* hereby *defined* as the *doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association or corporation.*" (Emphasis added.)

As the Idaho Supreme Court stated in its opinion in this case:

> "The language of I. C. § 5-514 (a) is broad. It is designed to provide a forum for in-state residents in a world of increasingly complex commercial transactions. The statute is remedial in nature and should be broadly construed. Doggett v. Electronics Corp. of America, 93 Idaho 26, 454 P. 2d 63 (1969)."

In all of the examples set out above, the original contact was initiated by the seller in canvassing prospective buyers. If the seller had not canvassed the buyer the transaction would never have occurred. It is interesting to note that only one of the four methods of canvassing requires the personal presence of a seller's representative within the buyer's state of residence.

After canvassing the prospects the sellers find out what prospects are interested and what prospects are not interested. We all know that in sales work the salesman figures that if he canvasses so many prospects that so many prospects will be interested and from those interested there is a predictable number who will make a purchase.

It should also be noted that in this case the sale involved a sale of 30,000-60,000 feet of pipe at $2.95 per foot or $88,500. Such a sale is a significant piece of business and did result from Cal-Cut's activity of sending flyers directly to Southern Idaho. It is the realization of pecuniary benefit that subjects the sender of the flyer into Idaho to the jurisdiction of the Idaho Courts.

If a state is going to protect its citizens, as consumers, from fly-by-night operations, which operate outside the state but which offer merchandise for sale through advertising or flyers with toll free telephone numbers, then this Court has no alternative but to uphold the opinion of the Supreme Court of Idaho, which held that whoever actively and directly attempts to make sales to the citizens of Idaho in such a manner are subjecting themselves to the jurisdictions of the Idaho Courts under Idaho's Long-Arm Statute.

Southern Idaho would like to point out to the Court that Appellant wants to disregard the case of *Fulmer v. Sloan's Sporting Goods Co.*, 277 F. Supp. 995 (1967) which the Idaho Supreme Court discussed in its opinion in *Southern Idaho Pipe & Steel v. Cal-Cut Pipe,* supra, as follows:

> "The United States Federal District Court for the Southern District of New York had an opportunity to interpret Idaho's long-arm statute in a diversity action initiated by an Idaho citizen against a New York distributor of guns and ammunition. Fullmer v. Sloan's Sporting Goods Co., 277 F. Supp. 995 (1967). Defendant advertised its products in a magazine of national circulation and sold its products to out-of-state customers by mail order. In holding that the defendant was subject to the jurisdiction of Idaho, the court stated:
>
> 'In advertising its products in magazines of national circulation, which led to the sale here involved, defendant was doing an act for the purpose of realizing pecuniary benefit or attempting to accomplish its business purposes in the State of Idaho, which was sufficient to subject defendant to jurisdiction in Idaho under subdivision (a) of Section 5-514 of the Idaho Code.' 277 F. Supp. at 997.

"Note that the court predicated jurisdiction on the fact that d e f e n d a n t advertised in magazines that enjoyed an Idaho circulation and could be expected to reach Idaho clientele. The Court could have added that defendant also shipped its wares directly to Idaho customers, but it did not. Apparently the Court felt that the *mere solicitation of customers in a magazine of national circulation was sufficient to constitute doing business in Idaho within the meaning of I. C. § 5-514 (a).*"

Following the *Sloan's Sporting Goods Co.* case it is apparent that if an advertisement in a magazine of national circulation is sufficient to invoke jurisdiction then the direct mailing of a flyer to a prospective customer within the State of Idaho would also be sufficient to invoke jurisdiction of the Idaho Courts.

Cal-Cut argues that the Idaho Supreme Court erred in finding the case at bar similar to *Intermountain Business Forms, Inc. v. Shepard Business Forms Co.,* 96 Idaho 538, 531 P. 2d 1183 (1975), and urges that the mere act of sending the flyer to Southern Idaho was not the central part of the sales transaction as Southern Idaho was under no obligation to reply to the flyer. Conversely, if Cal-Cut did not want to be subject to the jurisdiction of the Courts of the State of Idaho, it should not have sent a flyer directly to an Idaho business. The flyer is what initiated the transaction, it was used to canvass prospective purchasers and by sending it to Idaho, Cal-Cut subjected itself to jurisdiction in the State of Idaho. Had the flyer not been sent, but had Southern Idaho initiated the transaction by calling Cal-Cut to inquire as to whether or not certain merchandise was available for sale, it would have been Southern Idaho who initiated the sale and there would be no jurisdiction in Idaho over Cal-Cut. Such is not the case however.

Cal-Cut questions the Idaho Supreme Court distinguishing the case of *Akichika v. Kellerher,* 96 Idaho 390, 539 P. 2d 283 (1975) from the case at bar. It is interesting to note that Justice Shepard wrote a dissent in the *Akichika* case and then wrote a dissent in the case at bar stating that if the *Akichika* case was proper then the

majority had erred in the case at bar. It is Southern Idaho's opinion that the *Akichika* case is distinguishable from the case at bar in two respects. First, the written advertisement was placed in the Portland Oregonian which is published in Portland with general circulation in the Oregon area. Had the ad originally been placed in the Boise Statesman in Boise, Idaho, or had a direct letter been sent to the purchaser who lived in Idaho, I am sure that the Court would have had no problem finding that this state had jurisdiction of the action. Second, Akichika went to Oregon and purchased the truck. In the case at bar the contract was entered into as a result of telephone conversations and correspondence between the two parties with Southern Idaho being in Idaho and Cal-Cut being in California. The final signing of the purchase order was by Southern Idaho in Idaho. In the case at bar, the flyer which initiated the sale was sent directly by Cal-Cut to Southern Idaho personally addressed to Archie Langdon. Mr. Langdon was not a person who picked up a newspaper in an airport out of the general circulation area of the newspaper and read an ad. Mr. Langdon was the person to whom the flyer was originally sent. This fact in and of itself distinguishes the case at bar from the *Akichika* case.

The Appellant in addressing itself to the question of due process and fair play found fault with the decision of the Idaho Supreme Court which held that the requirement of due process has been met in the case at bar. In discussing this matter we should point out the language of the Court in *Colony Press, Inc. v. Fleeman,* 308 N. E. 2d 78 (Ill. App. 1974) wherein the Court said:

"It must be noted that 'traditional notions of fair play and substantial justice' is an elastic phrase that necessarily varies with the relationship and situation of the parties."

As such, traditional notions of fair play and substantial justice change with the passage of time. What might not have been fair play 30, 20, 10 or even 5 years ago might well be fair play today. This is particularly so in the present commercial age where WATTS lines are repeatedly used for the transaction of business between parties who are residents of different states.

Since Cal-Cut initiated the business activity by sending the flyer to Southern Idaho, Southern Idaho believes that the Idaho Supreme Court's opinion on the question of due process in this case is correct. In it the Court stated at page 1250 of 576 P. 2d:

"On a purely quantitative basis the contacts in *Hanson* may have been as great as those in *McGee*. The crucial distinction between the two cases seems to be that in *McGee* the contacts, such as they were, were initiated by the defendant where as in *Hanson* they were not.

> 'The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, *but it is essential in each one that there be some act by which defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.*' Hanson v. Denckla, supra at 253. (Emphasis added.)

"We believe that Cal-Cut's initiation of business activity in Idaho is crucial to the resolution of the constitutional question. Unilateral activity usually will not be sufficient to establish the 'minimal contacts' with the forum state envisioned by *International Shoe,* but when a nonresident defendant initiates contact with residents of the forum state and those contacts proceed, we think the constitutional standard of *International Shoe* is satisfied. Cal-Cut has transacted business in Idaho for several years, business that was initiated directly by Cal-Cut, its customers receiving personalized invitations to purchase its wares. Under such circumstances, Cal-Cut cannot deny that it has a sufficient nexus with the state to allow the state's citizens an effective means of legal redress."

As pointed out in *Doggett v. Electronic Corporation of America,* 93 Idaho 26, 454 P. 2d 63 (1969), the Idaho legislature in adopting Idaho Codes 5-514-5-517 intended to exercise all the jurisdiction available to the State of Idaho under the due process clause of the United States Constitution.

As pointed out in *Colony Press Inc. v. Fleeman,* supra:

> "in the instant case, defendant should have known that he might be liabe to suit in Illinois if the bill were not paid."

It is apparent that the defendant, Cal-Cut, by actively soliciting business in Idaho to enhance its business purpose or objective knew or should have known that it was subjecting itself to the jurisdiction of the Idaho courts if anything went awry in the contract which developed out of its original contact with the prospective purchaser.

Southern Idaho would like to also point out that Cal-Cut cannot complain that the action could have been filed in California.

In *Tabor & Co. v. McNall,* 30 Ill. App. 3d 593, 333 N. E. 2d 562 (1975), Tabor, doing business in Illinois, contracted to buy a large amount of grain from McNall, a Wisconsin corporation. The contract was negotiated by phone between the Wisconsin office of McNall and the Illinois office of Tabor and confirmed in writings sent from Tabor to McNall.

McNall partially performed and then defaulted. Tabor filed suit in Illinois. Two weeks later McNall filed suit in Wisconsin. McNall filed a limited appearance in Illinois to stop the Illinois action which was denied. Tabor asked Illinois to enjoin McNall from proceeding with the Wisconsin case and an injunction was granted. Tabor also petitioned the Wisconsin Supreme Court to prohibit further action in the Wisconsin case. It was denied. McNall proceeded with the Wisconsin case to verdict.

McNall then appealed the order of the Illinois Court enjoining further action in Wisconsin. The Illinois Appellate Court found that Illinois had jurisdiction under the facts and also that Wisconsin had jurisdiction. The Court then held that the injunction should not have been granted and said:

> "It is not enough that there may be reason to anticipate a difference of opinion between the two courts, and that the courts of a foreign state would arrive at a judgment different from the decisions of the courts in the state of the residence of the parties. (Citation.) It is not inequitable for a party to prosecute a legal demand against another in any forum that will take legal jurisdiction of the case, merely because that forum will afford him a better remedy than that of his domicile. To justify equitable interposition it must be made to appear that an equitable right will otherwise be denied the party seeking relief. (Citation) (Royal League v. Kavanagh, 233 Ill. 175, 183, 84 N. E. 178, 181)".

It is therefore apparent that since Idaho has jurisdiction in this case that Cal-Cut cannot complain that the action could have been brought in California.

CONCLUSION

The decision of the Idaho Supreme Court as it relates to the question of jurisdiction is of fundamental importance to the citizens of Idaho.

The question basically reduces itself to the question, "Is the Court, by its interpretation of the law, going to invite out-of-state con artists to rip-off Idaho citizens?" The Idaho Supreme Court has historically espoused the philosophy of protecting Idaho's consumers and has interpreted the Long-Arm Statute liberally to that end. Indeed, the Idaho Supreme Court has oft times said that Idaho's statute was as liberal as that of any of our sister states. If that policy is to persist, as it certainly should, then the decision in this case must be affirmed.

The case of *Fullmer v. Sloan's Sporting Goods, Co.,* 277 F. Supp. 995, compels the conclusion that Idaho has jurisdiction under the admitted facts of this case. In *Fullmer v. Sloan,* supra, a foreign corporation by advertising products in a magazine of national circulation and selling such products to residents of Idaho by mail order subjected itself to Idaho jurisdiction under Idaho Code

5-514. This case in and of itself is sufficient to support the Idaho Supreme Court's opinion.

Should this Court reverse the decision of the Idaho Supreme Court they will be opening Pandora's box to allow all sorts of "rip-offs" of Idaho citizens by foreign merchandisers. What would result the next time a company such as Cal-Cut breaches a contract with an Idaho corporation? In view of the Cal-Cut advertisement which recently appeared in the Twin Falls, Idaho, Times-News, a copy of which is attached hereto as Appendix "A", it would seem that Cal-Cut would again argue that their advertisement was merely just a flyer; that the proposed purchaser, by calling the toll free WATTS line initiated the sale; and that the purchaser would have to come to California to sue Cal-Cut if they did not deliver.

It takes no imagination to assume a sales scheme, which might be out of a distant state, where the sale of an item for less than $100 would be made by a flyer being sent which asked the buyer to order by telephone. If a suit arose over the sales transaction, the Idaho citizen should not have to go to the distant state to collect his damages but should be allowed to bring suit in the State of Idaho.

In cases such as the one at bar, where a foreign corporation actively seeks the business of an Idaho citizen, by contacting the Idaho citizen within the State of Idaho, the Idaho citizen has the right under Idaho Code 5-514 to bring suit within the State of Idaho. Such a suit does not violate any traditional notions of fair play and justice. To hold otherwise would violate the rights of the consumer. The seller is in a better position to cover the cost

of litigation by going to the State where he solicited business. The seller submitted itself to the jurisdiction of the Idaho Courts by contacting a buyer located within the State of Idaho.

Dated January 9, 1978.

Respectfully submitted,

HEPWORTH, NUNGESTER & FELTON
By JOHN C. HEPWORTH

Attorneys for Respondent

APPENDIX "A"

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Time News 4/4/77